

**Rule 13, Ariz. R. Crim. P.**

**RESPONSE TO MOTION TO DISMISS AS DUPLICITOUS.....Revised 2/2004**

A charge is not duplicitous simply because the crime it charges may be committed in more than one way and the charge lists both ways in the alternative.

The State of Arizona, in response to the defendant's Motion to Dismiss Count 2, asks this Court to deny the motion because Count 2 is not duplicitous. Even if this Court finds that the charge is duplicitous, any error can be cured by an appropriate jury instruction. The following Memorandum supports this motion.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. Factual and Procedural Background**

On August 3, 2003, the defendant robbed the victim at gunpoint and took her car. On that date, the defendant was on juvenile probation, having previously been adjudicated delinquent for Aggravated Assault on a Police Officer, a class 6 felony. As a result of the defendant's actions in this case, he has been indicted on Count 1, Armed Robbery, a Class 2 Dangerous Felony, and Count 2, Misconduct Involving Weapons, a Class 4 Felony. He is pending trial on both of those charges.

Count 2 of the pending indictment reads:

Timothy Jesus Herrera, on or about the 3rd day of August, 2003, possessed a handgun, a deadly weapon, while being a prohibited possessor, in violation of A.R.S. §§ 13-501, 13-3101, 13-3102, 13-701, 13-702, 13-702.01 and 13-801.

A.R.S. § 13-3102(A)(4) provides in part:

A person commits misconduct involving weapons by knowingly ...  
[p]ossessing a deadly weapon if such person is a prohibited possessor:

A.R.S. § 13-3101(A)(6) defines "prohibited possessor." That subsection provides in part:

“Prohibited possessor” means any person:

(b) Who has been convicted within or without this state of a felony or who has been adjudicated delinquent and whose civil right to possess or carry a gun or firearm has not been restored.

\* \* \*

(d) Who is at the time of possession serving a term of probation pursuant to a conviction for ... a felony offense ....

At the time the defendant had committed the offenses alleged in this cause number, he had been adjudicated delinquent for a felony offense and was serving a term of probation for that offense. Therefore, he was a “prohibited possessor” as defined in A.R.S. § 13-3101(A)(6) under subsection (b), subsection (d), or both.

In his motion to dismiss Count 2, the weapons misconduct charge, the defendant states that “[T]he failure of the indictment to specify a single basis upon which [he] is to be determined by a jury to be a ‘prohibited possessor’ renders such charge to be defective and duplicitous.” Defendant’s Motion to Dismiss at 2. However, the charge is neither defective nor duplicitous, as will be explained below.

## **II. Law and Argument**

Arizona law requires that each charged offense be charged in a separate count in an indictment, information, or complaint. See Rule 13.3(a), Ariz. R. Crim. P. A duplicitous indictment charges two or more distinct and separate offenses in a single count. “Since Arizona law requires that each separate offense be charged in a separate count, an indictment which charges more than one crime within a single count may be dismissed as duplicitous.” *State v. Schroeder*, 167 Ariz. 47, 51, 804 P.2d 776, 780 (App. 1990). Charging more than one act in a single count is forbidden because it does not provide a defendant with adequate notice of the charge against which he must defend,

presents a hazard of a non-unanimous jury verdict, and makes a precise pleading of double jeopardy impossible in the event of a later prosecution. *State v. Davis*, \_\_\_ Ariz. \_\_\_, \_\_\_, ¶ 54, 79 P.3d 64, 76 (2003), citing *State v. Whitney*, 159 Ariz. 476, 480, 768 P.2d 638, 642 (1989).

The defendant cites cases in which courts found certain charges to be duplicitous. However, those cases are distinguishable from the defendant's own case, in that they involved several separate and distinct criminal acts that occurred over a period of time, rather than one act by a defendant that violates a statute in several ways.

It is clear that a count charging one crime is not considered duplicitous merely because it charges alternate ways of violating the same statute. *State v. O'Brien*, 123 Ariz. 578, 583, 601 P.2d 341, 346 (App. 1979).<sup>1</sup> In *State v. Axley*, 132 Ariz. 383, 646 P.2d 268 (1982), the defendant was indicted for first degree murder. He argued that the murder count of the indictment was duplicitous because it alleged in a single count both premeditated murder and, in the alternative, felony murder in the course of armed robbery. The Arizona Supreme Court disagreed, stating that, while the count listed the two ways the crime of first degree murder can be committed, "it charged him with only one crime." *Id.* at 392, 646 P.2d at 277.

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<sup>1</sup> In *O'Brien*, the defendant was indicted on fraud offenses. The statute in question required sellers to sign and disclose certain documents and retain executed copies. Each count charged the defendant both with failing to sign and disclose a document and with failing to retain a copy. He argued that the counts were duplicitous because they charged two alternate ways of violating the same statute. The Court of Appeals disagreed, reasoning that the statute's objective was to require disclosure. Failure to retain a copy was not a separate offense – it was "merely an added responsibility designed to ensure and confirm performance of the principal objective." *O'Brien, id.*

In *State v. Whitney*, 159 Ariz. 476, 768 P.2d 638 (1989), the Arizona Supreme Court again found that an indictment was not duplicitous because it charged only one crime. In that case, the defendant pursued two girls with his truck, trying to run over both of them. The information charged the defendant with aggravated assault by intentionally using his truck to place victim A and/or victim B in reasonable apprehension of immediate physical injury. He claimed that the indictment was duplicitous because he could be convicted on a non-unanimous verdict, apparently reasoning that some jurors could decide that he had pursued victim A and others could conclude that he had pursued victim B. The Arizona Supreme Court found that the indictment was not duplicitous, because the “defendant was charged with one count of aggravated assault based on his pursuit of the two girls with his pickup truck. Even though the effect of his actions was an assault on both girls, the count in question is predicated on a single act.” *Id.* at 480, 768 P.2d at 642. The Court also noted, “even if the count was duplicitous, it could be cured by a proper instruction.” The instruction the trial court gave made it clear that “the jury had to find that the defendant’s action in chasing the girls with his pickup was one aggravated assault,” and it was clear that he was convicted for the single act of chasing the two girls. *Id.* Further, the defendant was not denied any essential right to his defense because he did not claim that he had chased only one of the girls – instead, he claimed that the victims had fabricated the offenses. *Id.*

Further, an indictment that charges a defendant with violating a statute need not specify the precise means by which the defendant violated the statute. See *State v. Fisher*, 21 Ariz. App. 604, 605, 522 P.2d 560, 561 (1974). In *Fisher*, the defendant

moved for a directed verdict, claiming that the information did not correctly allege the specific means by which he violated the statute. The trial court denied the motion for directed verdict, and the Court of Appeals affirmed the trial court's decision. The Court emphasized that its "reading of the information indicates that it was couched in terms broad enough to indicate to the defendant that he was being charged with a violation of the statute. It is not fatal that it did not particularize by which one of the three methods the infraction did occur." *Id.* In addition, a defendant is not entitled to a unanimous verdict on the precise manner in which he committed the offense.

Although a defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, *State v. Counterman*, 8 Ariz. App. 526, 448 P.2d 96 (1968), the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed.

*State v. Encinas*, 132 Ariz. 493, 496, 647 P.2d 624, 627 (1982); *accord*, *State v. Herrera*, 176 Ariz. 9, 16, 859 P.2d 119, 126 (1993); *State v. Gerlaugh*, 134 Ariz. 164, 169, 654 P.2d 800, 805 (1982); *State v. Axley*, 132 Ariz. 383, 392, 646 P.2d 268, 277 (1982).

In this case, the indictment charges the defendant with violating A.R.S. §13-3101 and §13-3102. These statutes can be violated in several ways, and in this case, the defendant violated the statutes by possessing a gun when he had been previously adjudicated delinquent and at a time when he was on probation. The defendant's actions do not constitute two separate and distinct crimes but simply two different methods of committing the same crime. See *Axley, supra*, and *Whitney, supra*. As the United States Court of Appeals for the Eighth Circuit noted, "[t]here may be more than one piece of evidence to support each count, but that certainly does not make the

counts duplicitous.” *United States. v. Adler*, 623 F.2d 1287, 1290 (1980) (citations omitted).

Finally, even assuming that Count 2 of the indictment is duplicitous, the defendant cites no authority in support of his request that the Court dismiss the count in its entirety. As the Supreme Court of Arizona explained in *Axley*, “[A] duplicitous ... indictment is remediable by the court’s instruction to the jury particularizing the distinct offense charged in each count of the indictment.” 132 Ariz. at 392, 646 P.2d at 277 [quoting *United States v. Robinson*, 651 F.2d 1188, 1194 (6th Cir. 1981)]. The Court noted that the jury instructions clearly set forth the legal elements to be considered in arriving at a verdict and the instructions remedied any concerns that the indictment was duplicitous. See 132 Ariz. at 392, 646 P.2d at 277. See also *State v. Petrak*, 198 Ariz. 260, 8 P.3d 1174 (App. 2000), in which the Court found that a charge was duplicitous, but stressed that a duplicitous indictment could be cured by a proper jury instruction:

When an indictment is merely duplicitous – i.e., when two (or more) offenses are charged in the same count of an indictment – the trial court may cure the error by instructing the jurors that they must unanimously agree regarding which offense was committed or that the defendant committed both (or all) of the offenses.

*State v. Petrak*, 198 Ariz. 260, 268, ¶ 28, 8 P.3d 1174, 1182 (App. 2000).

Accordingly, even if there were merit to Defendant’s argument that Count 2 of the indictment is duplicitous, his request that it be dismissed in its entirety is unwarranted.

### **III. Conclusion**

For the reasons set forth above, the State respectfully asks this Court to deny the defendant’s motion.